Supreme Court, U.S.
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No. 90-1424

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1991

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MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR,
*Petitioner*,

v.

DEFENDERS OF WILDLIFE, FRIENDS OF ANIMALS AND THEIR ENVIRONMENT, and THE HUMANE SOCIETY OF THE UNITED STATES,
*Respondents*.

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**On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

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## BRIEF FOR THE RESPONDENTS

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## QUESTIONS PRESENTED

1. Whether the findings of fact of the district court, independently reviewed by the United States Court of Appeals for the Eighth Circuit, that respondents have proven their standing to bring this action were clearly erroneous.

2. Whether the United States Court of Appeals for the Eighth Circuit correctly held that the Secretary's 1986 regulation barring interagency consultation on U.S. agency actions that may affect endangered or threatened species abroad violates the plain language of the Endangered Species Act.

## PARTIES

The petitioner is the Secretary of the Interior, Manuel Lujan, Jr.

The respondents are Defenders of Wildlife, Friends of Animals and Their Environment, and The Humane Society of the United States.

The respondents have no parent corporations or subsidiaries within the meaning of Supreme Court Rule 29.1.

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## BRIEF FOR THE RESPONDENTS

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### STATEMENT

This civil action presents two issues. The first is a straightforward application of this Court's standing precedent to a well-developed factual record. The issue on the merits is whether the Secretary's 1986 final rule which, in a sharp reversal of prior regulations, makes endangered species consultations unavailable to U.S. agencies when those agencies take action which may affect listed species abroad, violates the Endangered Species

Act. That Act requires the Secretary to engage in consultation with *each* federal agency on *any* action which may affect *any* species, wherever found. He refuses to do so.

This case raises no material foreign affairs concerns. Nothing indicates that the Endangered Species Act consultation process, in conjunction with the many other study processes federal agencies undertake, places any unacceptable burdens on U.S. agency planning. The administrative record in this action contains not a single comment from a foreign government indicating any concern about the effect of applying the Act to U.S. agency actions abroad.

This Court has long given the broad language of the Endangered Species Act its full play. In *TVA v. Hill*, 437 U.S. 153, 184 (1978), the Court identified the congressional purpose in passing the Act:

> The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. *This is reflected not only in the stated policies of the Act, but in literally every section of the statute.*

(Emphasis added.)

This case, like *TVA v. Hill*, involves the commands of Section 7 of the statute, 16 U.S.C. § 1536. There is nothing mysterious or unclear about the scope and impact of that section. As this Court recognized in *TVA v. Hill*:

> One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act. Its very words affirmatively command all federal agencies "to *insure* that actions *authorized*, *funded*, or *carried out* by them do not *jeopardize* the continued existence" of an endangered species or "*result* in the destruction or modification of habitat of such species. . . ." 16

> U.S.C. § 1536 (1976 ed) (Emphasis added). This language admits of no exception.

437 U.S. at 173 (emphasis in the original).

Both on standing and on the merits, the decision of the Eighth Circuit in this case was correct and fully consistent with the decisions of this Court. This Court should affirm the judgment of the court of appeals.

**1. The Act Itself**

> "[T]he Act, viewed as a whole, clearly demonstrates congressional commitment to worldwide conservation efforts."
>
> *Defenders of Wildlife v. Lujan*, 911 F.2d 117, 123 (8th Cir. 1990) (*"Defenders II"*).

**Section 2**—The opening section of the Act evinces Congress' intent to protect endangered species worldwide. The Act states that the United States has pledged itself in at least six international treaties to conserve endangered species, and it identifies one of the primary purposes of the Act to be the means to achieve the goals of those treaties and conventions. 16 U.S.C. § 1531(a)(4) and (b). The Act commands "all federal departments and agencies" to use their authorities in furtherance of its purposes, including the international purposes just recited. 16 U.S.C. §§ 1531(c) and 1536(a)(1).

By stating that a purpose of the Act was to implement international conventions dealing with endangered species, there can be no doubt that Congress intended that the Endangered Species Act would affect U.S. actions abroad. The treaties that the Endangered Species Act implements recognize the international scope of the problem of preserving endangered species.

By way of example, in the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES"), March 3, 1973, 27 U.S.T. 1087, 1090,

T.I.A.S. No. 8249, 993 U.N.T.S. 243, *amended by* T.I.A.S. No. 11079, the United States agreed that, "wild fauna and flora in their many beautiful and varied forms are an irreplaceable part of the natural systems of the earth which must be protected for this and generations to come," and recognized, "the ever-growing value of wild fauna and flora from aesthetic, scientific, cultural, recreational and economic points of view." The United States has undertaken to protect endangered species listed in Appendix I, II and III to CITES. The Senate Report on the Endangered Species Act declared a purpose of the Act to be, "provision for the administrative implementation of the international convention on endangered species." S. Rep. No. 307, 93rd Cong., 1st Sess. 1 (1973). This Court has traditionally shown great deference to statutes implementing treaties. *Missouri v. Holland*, 252 U.S. 416 (1920).

**Section 4**—Under Section 4 of the Act, 16 U.S.C. § 1533,

> The Secretary shall by regulation promulgated in accordance with subsection (b) determine whether any species is an endangered species or a threatened species . . . .

16 U.S.C. § 1533(a)(1). Under Section 4(b):

> (1)(A) The Secretary [of the Interior] shall make determinations . . . solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or *foreign nation*, . . . to protect such species . . . .
>
> (B) In carrying out this section, the Secretary shall give consideration to species which have been—
>
> > (i) designated as requiring protection from unrestricted commerce by any *foreign nation*, or pursuant to any *international agreement;* or

> (ii) identified as in danger of extinction . . . by any State agency or by any agency of a *foreign nation* that is responsible for . . . conservation . . . .

16 U.S.C. § 1533(b) (emphasis added). The Secretary's regulations with regard to listing, and the lists of endangered species themselves, are found at 50 C.F.R. Part 17.

Under Section 4 and the Secretary's published regulations, both domestic species and foreign species are listed. The Secretary does not contest that as of May 1989, of 1,046 species listed by him as endangered or threatened, 507 were species whose range is outside the United States. *Defenders II*, 911 F.2d at 123. The Secretary has never in this litigation disputed that the Act requires him to list both domestic and foreign endangered species, and he continues to do so. *See, e.g.*, J.A. at 245-46, 251.

**Section 7**—Section 7 of the Endangered Species Act implements practically Congress' intent that all federal agencies "shall seek to conserve endangered species and threatened species." 16 U.S.C. § 1531(c)(1). Under Section 7(a)(2), 16 U.S.C. § 1536(a)(2),

> *Each* Federal agency shall, in consultation with and with the assistance of the Secretary, insure that *any* action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of *any* endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species . . . .

(Emphasis added.) After consultation with an affected agency, the Secretary must issue a biological opinion on the effect of the proposed federal agency action on listed species, and propose an acceptable alternative action if the intended action is found to jeopardize listed species. 16 U.S.C. § 1536(b)(3).

**The "May Affect" Standard**—The requirement for Section 7 consultation is triggered when a federal action

*may affect* any listed species. In other words, Section 7 consultation occurs based upon a possibility of harm, or an increased risk of harm, to endangered species from federal action. There is no requirement that actual harm to listed species be shown prior to initiation of the Section 7 process. The Secretary has long agreed with this interpretation of the statute. *See, e.g.*, 50 C.F.R. § 402.14(a) ("Each federal agency shall review its actions at the earliest possible time to determine whether any action *may affect* listed species or critical habitat. If such a determination is made, formal consultation is required. . . .") (emphasis added); 51 Fed. Reg. at 19949 (1986) (explaining "may affect" standard).

**The Role Of The Secretary**—The Secretary is in charge of implementing the Endangered Species Act. In his answer to the amended complaint in this action, the Secretary admits, "that he is primarily responsible for implementation of the Endangered Species Act (ESA) with regard to those species under the jurisdiction of the Department of Interior." J.A. at 245.[1] *See also* 51 Fed. Reg. at 19928 (1986). The Secretary also admits, "the Fish and Wildlife Service (FWS) was designated the lead agency for the formulation of regulations concerning section 7 of the ESA." J.A. at 246.

Section 4 requires the Secretary to list foreign endangered species, and Section 7 requires the Secretary to consult on actions which may affect *any* listed species. Nothing in the language of Section 7, nor any other part of the Act, restricts the scope of his consultation duty only to federal agency actions that threaten wildlife within the United States.

**Sections 9 and 11**—Like Sections 4 and 7, Section 9, 16 U.S.C. § 1538, and Section 11, 16 U.S.C. § 1540, explicitly govern conduct which harms listed species abroad.

---

[1] The Secretary of Commerce is responsible for implementing the Act with regard to certain ocean dwelling listed species.

Section 9 prohibits the import and export of endangered species, and bars sales of such animals "in interstate or foreign commerce." 16 U.S.C. § 1538(a)(1)(A) and (F). Section 11 provides for forfeiture of listed species illegally "exported or imported" and provides for condemnation of vessels carrying such poached animals. 16 U.S.C. § 1540(e)(4) and (5).

**The Citizen Suit Provision**—Section 11 also contains the jurisdictional basis under which the district court and the court of appeals decided this case, the Act's citizen suit provision. That provision provides in part:

> [A]ny person may commence a civil suit on his own behalf—
>
> > (A) to enjoin any person, including the United States . . . who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof; or . . .
> >
> > (C) against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under section [4] . . . which is not discretionary with the Secretary.
>
> The district courts shall have jurisdiction . . . to enforce any such provision or regulation, or to order the Secretary to perform such act or duty . . . .

16 U.S.C. § 1540(g)(1). The statutory definition of "person" includes corporations and associations such as the respondents. 16 U.S.C. § 1532(3).

In this case, the acts of the Secretary plainly violate a provision of the Act within the meaning of 16 U.S.C. § 1540(g)(1)(A)—the Secretary has violated Section 7 of the Act by publishing a final rule refusing to provide the required consultation on *any* federal action which may affect *any* listed species. The promulgation of that final rule is itself a defined agency action under Section 7, subject to prompt judicial review under the citizen suit provision. 50 C.F.R. § 402.02, App. of Sec'y at 13a. The

Secretary's rule has reduced the level of protection provided to endangered species overseas. In his answer, the Secretary admits that, "the effect of [the rule] changes was to deny to species listed by the Fish and Wildlife Service pursuant to Section 4 of the Act whose primary range is outside the United States the protection those species had received both under the 1978 rule and the Act." J.A. at 248-49.

The Secretary's final rule is also susceptible to judicial review under 16 U.S.C. § 1540(g)(1)(C). Under Section 4(d) of the Act, 16 U.S.C. § 1533(d), the Secretary is required to issue regulations necessary and advisable to provide for the conservation of species listed under Section 4(c). By refusing to provide Section 7 consultations on projects affecting endangered species abroad, the Secretary is failing to provide for the conservation of listed species. The Secretary has in effect largely delisted those species. He has taken from them the protections they are guaranteed under the Act.

**2. The History Of The 1978 Rule And The 1986 Rule**

Shortly after passage of the Act in 1973 the Department of the Interior and other federal agencies began a series of discussions designed to outline the requirements Section 7 imposed on federal agencies and departments. *See* J.A. at 22-25, and 43 Fed. Reg. 870 (1978). On April 22, 1976, the Secretary issued "Guidelines to Assist Federal Agencies in Complying with Section 7 of the Endangered Species Act of 1973." *See* J.A. at 26. After revision, the Secretary issued a Notice of Proposed Rulemaking on January 26, 1977. 42 Fed. Reg. 4868 (1977). Both the Guidelines and the proposed rule explicitly stated that the consultation provisions of Section 7 applied to agency actions that may affect listed species in other countries. Proposed 50 C.F.R. § 17.91, 42 Fed. Reg. at 4871 (1977). The Federal Register notice on the proposed rule described in detail the interagency debate which had occurred on applying Section 7 to agency ac-

tions affecting listed species overseas. 42 Fed. Reg. at 4869.

The proposed rule received extensive comment and led to final rulemaking on January 4, 1978. 43 Fed. Reg. 870 (1978), codified at 50 C.F.R. Part 402 (the "1978 rule"). The final rulemaking retained the provision of the proposed rule applying Section 7 requirements to federal agency actions that may affect listed species in foreign countries. 50 C.F.R. § 402.02, 43 Fed. Reg. at 874 (1978).

Congress amended the Act in 1978. Pub. L. No. 95-632, § 3, 92 Stat. 3751 (1978). Congress enacted the new Section 7(a) (the current form of the consultation requirement) with the specific intention of restating existing law on Section 7 consultation requirements, including the regulations comprising the 1978 rule. *See* H.R. Conf. Rep. No. 1804, 95th Cong., 2d Sess. 18 (1978). Congress thereby affirmed the correctness of the interpretation given to Section 7 in the 1978 rule.

"Despite this evidence of congressional intent, in 1983, the Secretary issued a notice of proposed rulemaking to revise the [1978 rule]." *Defenders II*, 911 F.2d at 124. *See* 48 Fed. Reg. 29990 (1983). The new proposed rule cut back the scope of Section 7 consultation requirements to actions proposed for the United States, its territorial waters, and the outer continental shelf. *Cf.* 51 Fed. Reg. at 19929 (1986) (explaining genesis of rule); J.A. at 46.

Over comments opposing his action, on June 3, 1986, the Secretary published a final rule revising the 1978 rule. 50 C.F.R. Part 402, 51 Fed. Reg. 19926 (1986) (the "1986 rule"). In response to the comments on the proposed rule, the Secretary retained that portion of the 1978 rule applying Section 7 to federal agency actions affecting species located on the high seas. The 1986 rule rescinded that portion of the 1978 rule which applied the

consultation requirements of Section 7 to federal agency actions that may affect species in foreign nations. The definition of "action" ("Federal agency action") in the 1986 rule purported to limit the applicability of Section 7's consultation requirement *only* to agency actions occurring in the United States or on the high seas. 50 C.F.R. § 402.02. No legislative history or dictionary definition was cited to support this odd definitional tack. This final rule by the Secretary represented a 180 degree turnabout from prior final agency policy. In his answer, the Secretary admits that the 1986 rule "is a final agency action." J.A. at 251.

The 1986 rule is a legislative rule, binding on the Secretary and the action agencies. The Secretary's unctuous contentions in his brief that his binding rule is some mere intepretive guideline are belied by the record, and intentionally obfuscate the legal effect of his actions.

The leading treatise on administrative law identifies the difference between legislative (binding) rules and interpretive rules as follows:

> [R]ules have force of law when issued pursuant to a grant of legislative power to make law through rules. The conclusion, very solidly based, is that rules are legislative when the agency is exercising delegated power to make law through rules, and rules are interpretative when the agency is not exercising such delegated power in issuing them.

2 K. Davis, *Administrative Law Treatise* § 7:10 at 54 (2d ed. 1979) (citing, *inter alia*, *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).

The Secretary promulgated the 1986 rule under the authority granted him in the Endangered Species Act, and intended to exercise that authority to the fullest in his rulemaking. 50 C.F.R. Part 402 identifies the authority for the 1986 rule to be the Act as a whole, "16 U.S.C. § 1531 *et seq.*" In response to comments contending that,

"the proposal goes beyond the scope of the Act," the Secretary replied that, "The Service is satisfied that the final rule is within the scope of the authority provided in the Act." 51 Fed. Reg. at 19928 (1986). To make clear that he was exercising delegated legislative authority in the 1986 rule, and that the 1986 rule was mandatory to all agencies, the Secretary went on to state:

> Moreover, *the Service is responsible for interpreting section 7 and for establishing a consultation process that is both uniform and consistent with statutory requirements.* This issue was addressed in the preamble to the 1978 rule:
>
> > The FWS and NMFS are authorized under the Act to issue such regulations as they deem appropriate for the conservation of listed species. *The two Services believe that these procedural regulations promote the conservation of listed species* . . . .
>
> Several commenters stated that Congress did not intend that the Service interpret or implement section 7, and believed that the Service should recast the regulations as "nonbinding guidelines" that would govern only the Service's role in consultation. *The Service notes that Congress reviewed with approval the section 7 regulations issued on January 4, 1978,* when deliberating over the 1978 Amendments to the Act. *See* H.R. Conf. Rep. No. 1804, 95th Cong., 2d Sess. 18 (1978). Also, the Service was urged by the House Committee, through its comments on the proposed rule, to press forward with the issuance of this final rule. *The Service is satisfied that it has ample authority and legislative mandate to issue this rule,* and believes that uniform consultation standards and procedures are necessary to meet its obligations under section 7. . . .

> *When this rule becomes effective, all pending and future consultations must comply with the requirements of these regulations. . . .*

51 Fed. Reg. at 19928 (1986) (emphasis added).

The 1986 rule is mandatory. The Secretary and the action agencies "must comply" with the rule. When the 1986 rule states that actions by federal agencies outside the United States and the high seas require no consultation, that means no consultation will occur, despite the contrary plain statutory language of Section 7.

**3. Congressional Reaction To The Secretary's 1986 Rule**

Congress has chided the Secretary about the 1986 rule. In the report of the House Committee on Appropriations accompanying the 1987 appropriations bill for the Department of the Interior, the following funding recommendation is made:

> The Committee also expects the [U.S. Fish and Wildlife] Service to continue to provide consultation on endangered species to United States agencies dispensing foreign assistance.

H.R. Rep. No. 714, 99th Cong., 2d Sess. 19 (1986). *See also* H.R. Rep. No. 171, 100th Cong., 1st Sess. 15 (1987); H.R. Rep. No. 713, 100th Cong., 2d Sess. 15 (1988). In the Senate, the Committee on Environment and Public Works, in reporting out the Endangered Species Act Amendments of 1987 (S. 675), stated:

> To the extent that [the 1986] regulations attempt to restrict the Act's requirements that each federal agency consult with the Secretary to ensure that its actions are not likely to jeopardize the continued existence and recovery of any listed species, the regulations have no statutory basis, are contrary to congressional intent, and are contrary to the law.

S. Rep. No. 240, 100th Cong., 1st Sess. 6-7 (1988). *See also* 134 Cong. Rec. S9758 (daily ed. July 25, 1988)

(statement of Sen. Chafee, floor manager of S. 675). Congress does not share the Secretary's apprehension about application of the Endangered Species Act to federal agency actions that may affect listed species abroad.

**4. The Litigation**

Respondents (collectively "Defenders") filed a complaint for declaratory and injunctive relief on August 27, 1986, alleging, *inter alia*, that the 1986 rule violated the Endangered Species Act. The jurisdictional basis for the Endangered Species Act claims was the citizen suit provision of Section 11 of that Act, 16 U.S.C. § 1540(g). First Amended Complaint at ¶ 1.

On February 25, 1987, the United States District Court for the District of Minnesota ordered the action dismissed, finding that Defenders lacked standing. *Defenders of Wildlife v. Hodel*, 658 F. Supp. 43 (D. Minn. 1987). In an opinion and order dated July 8, 1988, the United States Court of Appeals for the Eighth Circuit held that Defenders did have standing—that it had alleged substantive and procedural injuries fairly traceable to the Secretary's 1986 rule and redressable by the relief sought. *Defenders of Wildlife v. Hodel*, 851 F.2d 1035 (8th Cir. 1988) ("*Defenders I*"). The substantive injury was the increased risk of harm to endangered species absent consultation; the procedural injury was the Secretary's refusal to carry out the mandatory Section 7 consultations. The Secretary petitioned the Eighth Circuit for rehearing *en banc*, a petition denied on October 14, 1988.

On remand, Defenders moved for summary judgment on the merits of its claims. The Secretary deposed several members of Defenders and himself moved for summary judgment, though again on the issue of standing. Under Fed. R. Civ. P. 56(e), the Secretary had an obligation to submit contrary testimony or other evidence to overcome the affidavit and deposition testimony offered by

Defenders' members, if he wished to challenge the veracity of Defenders' testimony and create a genuine issue of material fact. He did not do so, and Defenders' testimony stands as given.

After review of the beefed-up factual record, the district court granted Defenders' motion for summary judgment on its Endangered Species Act claims in an opinion and order dated February 15, 1989, and denied the Secretary's motion. *Defenders of Wildlife v. Hodel*, 707 F. Supp. 1082 (D. Minn. 1989). The district court ordered the Secretary to revoke and rescind the 1986 regulation, and to publish regulations, "affirmatively requiring that each federal agency consult with the defendant Secretary with respect to any agency action that may affect any endangered or threatened species, wherever found." 707 F. Supp. at 1086.

The Eighth Circuit affirmed the order of the district court in all respects. *Defenders of Wildlife v. Lujan*, 911 F.2d 117 (8th Cir. 1990). On standing, the Eighth Circuit conducted its own review of the fact-laden record before it, and concluded that Defenders had proven standing under all applicable precedents of this Court, including *Lujan v. National Wildlife Fed'n*, 110 S. Ct. 3177, 111 L.Ed.2d 695 (1990). On the merits, the Eighth Circuit concluded based upon the plain language of the statute that the Secretary's Section 7 consultation duty extended to agency actions that may affect listed species abroad. The Secretary's petition for rehearing *en banc* was denied on December 10, 1990.

## SUMMARY OF ARGUMENT

On standing, the record before the Court contains testimony of Defenders' members both by affidavit and by subsequent deposition that they have visited sites of federally funded development projects overseas for the purpose of viewing and studying endangered species. Those projects have not been, and under the Secretary's 1986 rule never will be, subject to Section 7 consultations. Defenders' members have testified that they will be harmed by the increased risk of extinction to these species absent consultation. Congress created the consultation process specifically to remedy this harm.

On the merits, the statute is clear on its face. This Court has already declared that, "One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act." *TVA v. Hill*, 437 U.S. at 173. Taking the plain meaning of Sections 4 and 7 in context with the international concerns of the Act, the Eighth Circuit correctly concluded that the language of the statute shows Congress' intent to apply Section 7 to agency actions affecting protected species abroad.

## ARGUMENT

### I. DEFENDERS HAS STANDING

This case involves a routine challenge to the most classic agency "action" there is—a duly promulgated final rule.[2] Environmental group plaintiffs have sued on behalf of members who have visited project sites for the purpose of studying endangered species. Because of the Secretary's final 1986 rule, those projects have not been, and will not be, subjected to consultation under Section 7 of the Endangered Species Act. This lack of consultation places endangered species at an increased risk of extinction and harms Defenders' interests and the interests of Defenders' members. Ever since *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972), such facts have sufficed to support standing.

#### A. Congress Intended That Defenders Have Standing To Enforce The Endangered Species Act

Article III of the Constitution requires that to possess standing a plaintiff show an injury in fact, "fairly" traceable to the complained-of action, "likely" to be redressed by the relief sought. *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976). "Injury," however, is not a fixed legal term. This Court has recognized that, "'[t]he actual or threatened injury required by Art. III may exist solely by virtue of "statutes creating legal rights, the invasion of which creates

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[2] *See* 50 C.F.R. § 402.02 (defining as "action" within the meaning of Section 7 promulgation of regulations). Judicial review of final agency rules is presumed to be available and will not be refused absent clear evidence that such was the intent of Congress in the authorizing legislation. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967). This Court regularly decides facial legal challenges to newly promulgated final rules, prior to any specific enforcement activity. *See, e.g., Rust v. Sullivan*, 111 S. Ct. 1759, 114 L. Ed. 2d 233, 247 (1991) (action "challenging the facial validity of [abortion counseling] regulations and seeking declaratory and injunctive relief to prevent implementation of the regulations").

standing . . . .'" *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982) (citations omitted) (statutory right to be free from racially motivated false statements about availability of housing). *See also* Fletcher, *The Structure of Standing*, 98 Yale L.J. 221, 253 (1988) ("[W]hen the Court has decided actual cases involving statutory rights, it has never required any showing of injury beyond that set out in the statute itself."); Logan, *Standing to Sue: A Proposed Separation of Powers Analysis*, 1984 Wis. L. Rev. 37, 61-70 (in context of statutory rights and duties, separation of powers concerns counsel judicial deference to Congress' ability to define injury).

In the Endangered Species Act Congress defined a series of new legal duties, including the Section 7 consultation duty of "each" federal agency. Congress also defined broadly in the citizen suit provision the class of persons which has a legal right to enforce those duties. The citizen suit provision provides firm evidence of Congress' intent to have vigorous private enforcement of the Act occur.

The statute defines the appropriate scope of the standing inquiry. Without the Endangered Species Act, even the intentional killing of species near extinction would not be actionable, much less the failure of federal agencies to account for the effects of their actions on such species through consultation with the Secretary. Because of the Act, the increased risk of harm to endangered species which stems from the lack of consultation is a legal injury. Consultation itself reduces this injury, this risk of harm.

Defenders is the proper party to seek relief from the harm caused by lack of consultation. In reviewing a similar citizen suit provision this Court held that the provision, "was intended by Congress to allow suits by all persons possessing standing under this Court's decision in *Sierra Club v. Morton*." *Middlesex County Sewerage*

*Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 16 (1981). Defenders meets that standard.

Furthermore, by including a citizen suit provision in the Act specifically encompassing suits against the United States (including the Secretary), Congress has provided for judicial review of agency administrative rulemakings at a higher level of generality than would ordinarily be the case under, for instance, the Administrative Procedure Act. *Cf. Lujan v. National Wildlife Fed'n*, 111 L. Ed. 2d at 719-20. A facial challenge to the 1986 rule presents the type of clean legal issue Congress intended the courts decide when it included the citizen suit provision in Section 11 of the Endangered Species Act.

### B. The Extensive Factual Record Proves That Defenders Has Standing

In *Defenders II*, on review of cross-motions for summary judgment, the Eighth Circuit had before it a fully developed factual record on the standing issue. The Eighth Circuit also carefully applied this Court's most recent case relating to standing in the context of motions for summary judgment, *Lujan v. National Wildlife Fed'n*. The Eighth Circuit concluded, "Defenders had met its burden of proving standing at the summary judgment phase of the litigation." 911 F.2d at 120. The factual findings of the district court on standing, revisited by the Eighth Circuit, are not clearly erroneous. *Cf. Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 72, 74 n.19 (1978).

#### 1. *Defenders And Its Members Have Been Injured By The Failure To Consult*

The record before the Court demonstrates that the respondent organizations and their members have a professional and personal interest in Section 7 consultations being performed upon federal agency actions which may affect listed species overseas. The Secretary's 1986 rule harms those interests. The following section summarizes

the record evidence on the interests of Defenders and certain of its members who gave testimony in this action.

**Defenders of Wildlife** is an environmental organization formed, "to preserve, enhance and protect the natural abundance and diversity of wildlife including the integrity of natural wildlife ecosystems." J.A. at 116. Defenders of Wildlife addresses, "international [wildlife] issues primarily through the avenues of influence provided by domestic government and international non-governmental organizations." J.A. at 101. A reduction in biodiversity will harm Defenders as an organization.

Defenders of Wildlife has been actively involved in the negotiation and implementation of international wildlife treaties. Defenders of Wildlife has had official representatives at CITES, where "[their] unique expertise has often been solicited by governmental delegates." J.A. at 103.

Defenders of Wildlife informs its members about international wildlife issues through the publication of articles in *Defenders* magazine. Defenders of Wildlife members and staff actively seek out international wildlife viewing experiences for pleasure and for professional reasons. *See, e.g.*, Affidavits of H. Elliott McClure, Maxine McCloskey, Joyce Kelly, and Amy Skilbred. J.A. at 119, 135, 100, 144.

**H. Elliott McClure** is a member of Defenders of Wildlife and has been since the early 1950's. He has been a member of the Board of Directors for Defenders of Wildlife and was Chairman of the Tropical Wildlife-International Committee at the time he gave his affidavit. Dr. McClure received his doctorate in wildlife conservation in 1941. He worked in Southeast Asia as an ecologist for the Walter Reed Army Institute of Research for 25 years, has authored over 125 publications with a heavy emphasis on wildlife conservation, and has studied and observed many species which were, or have since become, endangered. J.A. at 120. Such species include wild elephants,

the one-horned rhinoceros, several species of monkeys and several species of birds, notably hornbills. J.A. at 284. Dr. McClure continues to supervise research on threatened and endangered species, especially research concerning the hornbills of Southeast Asia which he started in 1963. J.A. at 285. "The entire family [of hornbills] in Southeast Asia, about 35 species, are all endangered." *Id.*

In 1983 Dr. McClure led a group of 25 people to Malaysia, Sumatra and Borneo to view wildlife. J.A. at 280. During that trip Dr. McClure also visited Thailand and Japan to check on his research. J.A. at 281. Dr. McClure intends to return to this area and continue to view wildlife and update his research, health permitting. J.A. at 286.

World Bank and Bureau of Reclamation dam projects occurring in both Thailand and Malaysia threaten endangered wildlife that Dr. McClure has observed and studied. J.A. at 282-283. These projects include the Nam Choan Dam on the Kwae Yai River in Thailand, and the Temenggor Dam in Malaysia, J.A. at 120-21,[3] as well as

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[3] While the lower courts did not need to reach the issue to determine that Defenders had proven standing, it is clear that U.S. agency action within the meaning of Section 7 accompanies development projects funded by the World Bank. While the World Bank is not itself a federal agency, the Secretary of the Treasury has authority to instruct the vote of the United States' representative on the board of executive directors of the World Bank (the United States possesses almost 20% of the votes on that executive board). Exec. Order No. 11,269, 31 Fed. Reg. 2813 (1966), *reprinted in* 1966 U.S. Code Cong. & Admin. News 4622; 22 U.S.C. §§ 286-286kk. In addition, the Endangered Species Act defines "federal agency" to be "any department, agency, *or instrumentality* of the United States." 16 U.S.C. § 1532(7) (emphasis added). World Bank loans require federal agency action by the Treasury Department. Both the Treasury and the World Bank are "instrumentalit[ies] of the United States" subject to Section 7 of the Endangered Species Act when United States money is used to finance development projects abroad through the Bank.

Congress has recognized and in the past used U.S. agency control over votes on the governing boards of the World Bank and its sister

the U.S. Bureau of Reclamation's planned dam projects in the Lower Mekong River Basin in Thailand, J.A. at 121.

These projects "may affect" endangered and threatened species and their habitats and would be subject to Section 7 consultation but for the 1986 rule. "If the Nam Choan Dam goes ahead, then the largest population of Asian elephants in Thailand, as well as other threatened species such as the guar and tapir, could face destruction." J.A. at 94. The Temenggor Dam Project threatens the survival of, "100 species of mammals and 300 species of birds. Most of these species are already near extinction. Most severely affected have been the Sumatran rhinoceros, the Malayan tapir, the Malayan elephant and the flying lemur." J.A. at 95. Larger than the previously described projects, the Lower Mekong River Basin Project proposes a dam, "the size of the Grand Coulee with a reservoir that could irrigate 2 million hectares." J.A. at 63.

Lack of Section 7 consultation on these and other U.S. funded projects in Southeast Asia has and will continue to cause irreparable harm to Dr. McClure. J.A. at 121. As well as suffering the emotional harm that would come from the increased risk of extinction to species that he has worked with, Dr. McClure would suffer professional harm, "because [his] professional research and people

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institution stemming from the 1944 Bretton Woods conference, the International Monetary Fund, to advance United States policy interests overseas. *See, e.g.*, 22 U.S.C. § 286aa(a) ("[T]he Secretary of the Treasury shall instruct the United States Executive Director of the [International Monetary] Fund to actively oppose any facility involving use of Fund credit by any Communist dictatorship . . . ."); 22 U.S.C. § 286aa(b) (similar instruction with regard to countries practicing apartheid); 22 U.S.C. § 262m-2, 4, 5, 7 (the Secretary of the Treasury shall instruct the United States Executive Director at, *inter alia*, the World Bank, to give appropriate consideration to environmental concerns in decisionmaking).

that are carrying it on would be forced to stop." J.A. at 284.

**Joyce M. Kelly** was the Chief Executive Officer and a member of Defenders of Wildlife at the time of her affidavit. She previously worked for over a decade in conservation and natural resource management, including directing the Wilderness Program of the Bureau of Land Management of the United States Department of the Interior. J.A. at 100.

Ms. Kelly has visited Israel and Egypt to observe the habitat of the Eurasian peregrine falcon and the Nile crocodile, both of which are endangered; she has attempted to observe the animals themselves. J.A. at 100-101. The rehabilitation of the Aswan High Dam on the Nile, which is being overseen by the U.S. Bureau of Reclamation, will affect the habitat of the endangered Nile crocodile, including the area where Ms. Kelly visited. J.A. at 101. She intends to return to the area to try to view and study the crocodile. *Id.* Ms. Kelly will suffer both professional and personal harm if the Aswan High Dam rehabilitation project continues without Section 7 consultation. *Id.*

Ms. Kelly identified a project, the Aswan Dam rehabilitation, undertaken with U.S. agency action, which would affect habitat of an endangered animal, the crocodile, which she had visited. A project affecting habitat of an endangered species meets the "may affect" standard of Section 7. The Secretary never rebutted Ms. Kelly's testimony and it stands as offered.

**Amy Skilbred** is a member of Defenders of Wildlife and a wildlife biologist. J.A. at 309. Ms. Skilbred studied the area affected by the World Bank's Polonoroeste project in Brazil while a graduate student at Johns Hopkins. J.A. at 321-22.[4]

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[4] The effects of the Polonoroeste Project could be to accelerate destruction of forests in Rondonia, leading to the deforestation of

Ms. Skilbred has traveled extensively to study wildlife. She has traveled to Sri Lanka specifically to seek endangered wildlife and to study wildlife habitat at the site of the U.S. Agency for International Development's ("AID") Mahaweli Dam project, where listed endangered species including leopards and Indian elephants exist. J.A. at 317. She determined-she had been at the specific site of the Mahaweli project through review of an Environmental Assessment prepared by AID. *Id.*

The U.S. Fish and Wildlife Service has recognized that the Mahaweli project, "could have massive environmental impacts on such an insular ecosystem as the Mahaweli River system," J.A. at 215, easily meeting the "may affect" standard triggering Section 7 consultation. This project could be particularly disastrous for the Asian elephant as it will destroy a migration route and a vital feeding ground for that animal. J.A. at 92. This project will also, "seriously affect the habitat of many animals, including the Indian elephant, the leopard, the red-faced malkoha (which is endemic to Sri Lanka) the swan crocodile, the estuarine crocodile, the Bengal monitor and the python." J.A. at 95. *See also* J.A. at 78 (FWS internal memo). In addition, the project will reduce the habitat of a number of threatened species endemic to the island. J.A. at 95.

At her deposition Ms. Skilbred succinctly illustrated the nature of the harm to her interests if the Mahaweli project goes forward without Section 7 consultation:

> Q: And for what purpose would you like to go back to Sri Lanka to visit the Mahaweli Project?
>
> A: *I'd rather go back to visit the wildlife that live in the area* of the Mahaweli Project . . . .

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the entire state. The result of this deforestation would be that, "untold numbers of species of plants and animals will become extinct as the forest disappears." Plaintiffs' Appendix to the district court in *Defenders I*, Volume I at 12.

J.A. at 318 (emphasis added). She testified as to her fixed intention to return to the site. J.A. at 320-21. The specific date of her return is irrelevant—if the endangered species are eradicated by the project, they will be gone for the rest of time.

**The Humane Society of the United States** ("HSUS") has been actively involved in international protection and management of wildlife for more than ten years. HSUS has funded both a study to determine problems occurring as a result of development of the tropical rain forests and an investigation into the conservation and humane treatment of wild birds in foreign countries. HSUS also conducts wildlife viewing tours to Africa for the benefit of HSUS members.

**John Grandy** is a member and officer of the Humane Society of the United States. Dr. Grandy received his Ph.D. in wildlife ecology. He has been a wildlife specialist for the National Parks and Conservation Association, has served as staff assistant to the Senior Scientist at the President's Council on Environmental Quality, has served as Executive Vice President of Defenders of Wildlife and has been appointed to three major advisory committees to the U.S. Department of the Interior. Dr. Grandy participated in the negotiation of CITES in 1971, 1972 and 1973. He was a member of the U.S. Delegation to CITES in 1977, and has attended the meetings as an observer since 1979 and as a representative of HSUS since 1981. Dr. Grandy is an expert "in the fields of wildlife management, ecology, and biology." Affidavit of J. Grandy at ¶ 3; Defenders' App. at 2a.

Dr. Grandy has visited numerous countries both to participate in professional wildlife conservation meetings and to view wildlife. For example, in 1983 Dr. Grandy visited Botswana to attend the CITES meeting and to observe wildlife. J.A. at 263-64. In 1985 he visited Argentina for similar purposes. J.A. at 264. Dr. Grandy is aware of U.S. funded projects in both of these countries.

J.A. at 264. In 1988 he led two wildlife/endangered species sightseeing tours for HSUS throughout Kenya. These tours visited natural areas where U.S. funded projects were underway. J.A. at 265-66.

Dr. Grandy plans to return to these areas, principally in Africa, for both professional and personal reasons. J.A. at 266-67. Lack of Section 7 consultation by U.S. agencies has and will continue to cause both professional and personal injury to Dr. Grandy.

**J. Campbell Plowden** is a member of the Humane Society of the United States and a wildlife biologist. J.A. at 139. Mr. Plowden has made professional visits to various countries in South America and Southeast Asia to "study and enjoy the endangered and threatened wildlife." J.A. at 140. While in Brazil and Peru in 1986, Mr. Plowden observed the habitat of many endangered species including the jaguar, Uakari, and the Geoldi's marmoset. J.A. at 141. U.S. AID's Picchis-Palcazu forestry project "may affect" the ecosystem encompassing the species and habitat studied by Mr. Plowden. J.A. at 141, 293-94.

Mr. Plowden plans to return to areas in South America, including the Picchis-Palcazu project area, in order to observe and study endangered species. J.A. at 142 and 295. Mr. Plowden identified endangered species within the ecosystem in which the Picchis-Palcazu project occurs, J.A. at 141, 293, providing sufficient evidence to meet the "may affect" standard triggering Section 7, but for the 1986 rule. Mr. Plowden will suffer both professional and personal harm if this U.S. funded project does not receive Section 7 consultation. J.A. at 142.[5]

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[5] The Secretary contends in his brief at 7 n.2 that AID's support for the Picchis-Palcazu project ended in 1990, citing the Affidavit of James Hester (Gov't C.A. Reply Br. Addendum at 14). Mr. Hester's affidavit is, at best, equivocal. It states only that there was a "project assistance completion date" for a phase of the project in

In *Sierra Club v. Morton*, this Court held that an environmental organization did not have standing as it had, "failed to allege that it or its members would be affected in any of their activities or pastimes." 405 U.S. at 735. That case still provides the soundest basis for analyzing standing in environmental actions. The record in this case demonstrates that Defenders' members have a personal interest in Section 7 consultations being performed on federal agency actions which may affect listed species overseas. Both the respondent organizations and the members who have given testimony by affidavit and deposition in this case have shown a wide range of connections between their interests in endangered species abroad and U.S. agency actions which may jeopardize those species and harm those interests. These connections all rest at root on the personal, professional, and aesthetic interests identified in *Sierra Club v. Morton* as a sufficient basis for standing.

**Geographic Nexus**—Defenders and its members possess a geographic nexus to the agency actions at issue in the narrowest, most traditional sense: Amy Skilbred and Joyce Kelly have been physically present at federally funded project sites for the purpose of studying endangered species and their habitat, species and habitat which the projects "may affect," requiring Section 7 consultation. Under any reasonable interpretation of cases from *Sierra Club v. Morton* to *Lujan v. National Wildlife Fed'n*, personalized professional and aesthetic injury so tightly tied to a specific project location will support standing.[6] The Secretary admitted as much in *Defenders I*, 851 F.2d at 1041.

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September 1990, but does not indicate what that term involves, nor that AID is not interested in pursuing the project.

[6] The contention in the Secretary's brief at 23 that Defenders' members must constantly camp out at a project site to possess standing is simply absurd. No case has ever come close to so holding. The point of the standing inquiry is to ensure that Defenders and its members have, " 'such a personal stake in the outcome of the con-

**Ecosystem Nexus**—Defenders and its members also possess standing based upon an ecosystem nexus. In passing the Endangered Species Act, Congress declared as its purpose, "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved . . . ." 16 U.S.C. § 1531(b). In light of Congress' declaration that it intends to attack the problem of diminishing animal species at the level of generality of an ecosystem (and again in light of the citizen suit provision), Defenders possesses standing based upon the injury suffered by its members who use and enjoy any part of a contiguous ecosystem affected by federal action for purposes of studying or observing endangered species located in that ecosystem, even if the federal agency action which is damaging those interests is located some distance away from the tracts used by Defenders' members. For instance, in the context of a citizen suit under the Endangered Species Act, the argument made to the court of appeals by the Secretary that the decision in *Lujan v. National Wildlife Fed'n* denied Defenders standing based upon J. Campbell Plowden's testimony that he had worked in the ecosystem in which the Picchis-Palcazu project occurred was incorrect. *Cf.* 911 F.2d at 121 n.2 ("[t]he evidence showed that Plowden came only within several hundred miles of the Picchis-Palcazu project in Peru"). At his deposition, Mr. Plowden identified the ecosystem nexus between his work with endangered species and the threat to that work posed by AID's Picchis-Palcazu forestry project:

> Q: Would the Picchis-Palcazu project have had an impact on the population of jaguars, Uakari and Geoldi's marmoset for the area in which you visited?
>
> A: Yes. It could have.

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troversy as to assure that concrete adverseness which sharpens the presentation of issues.'" *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. at 72. The testimony of, *inter alia*, Amy Skilbred clearly shows that Defenders fulfills this purpose.

Q: Why is that?

A: The area that I visited and the area of the Picchis-Palcazu project are contiguous areas of tropical moist forest and reducing the population in one area affects the population in its entirety, reducing the size of the gene pool and making it that much more vulnerable to catastrophic events.

J.A. at 293-94. Such injury is sufficient to support standing under the Endangered Species Act's citizen suit provision.

In *Lujan v. National Wildlife Fed'n* Congress had not given the courts any guidance concerning at what level of generality, if any, they should look in identifying injury; e.g., how much of a national forest must be used by a plaintiff or affected by agency action before injury has occurred? In the Endangered Species Act, in Section 2, Congress specifically identified the level of generality at which injury can occur as the ecosystem level. Mr. Plowden identified personalized injury to his interests from AID's Picchis-Palcazu project at the congressionally mandated level of generality; that injury supports Defenders' standing to bring this action.

**Animal Nexus**—Defenders and its members also possess standing based upon an animal nexus. In cases involving wildlife statutes, this Court's decisions have recognized that a strict geographic nexus test for standing is not appropriate; concern should focus more on the specific species of animals which a plaintiff studies or enjoys. *See, e.g., Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 n.4 (1986) ("whale watching" identified as the protectable interest, regardless of geographic separation of whale watching activities from Japan's whale taking activities).

Obviously all of Defenders' members who have suffered harm based upon the strict geographic nexus test and the ecosystem nexus test have also suffered harm under

an animal based standard. *E.g.*, Amy Skilbred's interest in studying specific animals—leopards and Indian elephants—has been harmed by AID's Mahaweli Dam project, the site of which she has visited. Dr. Elliot McClure, however, has suffered injury based largely on an animal nexus. He has identified numerous endangered species, notably the hornbill family of birds, which he has spent a professional lifetime studying in Southeast Asia. Now those birds are threatened by projects carried out with the assistance of U.S. agency action, but without the protective benefits of Section 7 consultation. Just as the interests of the members of the American Cetacean Society in whale watching were legally injured by geographically distant taking of whales by Japanese whalers, so to Dr. McClure's interest in continued research and study of hornbills and other endangered species is harmed by the lack of Section 7 consultation on the World Bank's Nam Choan Dam and Bureau of Reclamation river projects in Thailand.

**Vocational Nexus**—Defenders and its members also possess standing based upon a vocational nexus. This Court has long recognized that persons with a professional interest in any given issue have a heightened stake in that matter, sufficient to support standing. For instance, in *Rust v. Sullivan*, there was no serious question but that professional health care providers possessed standing to challenge abortion counseling regulations which could limit their professional work. In this case, many of the Defenders members who gave testimony depend upon the existence of certain endangered species for their professional scientific activities. Amy Skilbred, Campbell Plowden, Dr. McClure, and Dr. Grandy are all wildlife biologists studying these rare animals and their habitats. If the Section 7 consultation process is not applied to U.S. agency actions that may affect those species, those individuals will lose their professional identity. They will be transformed from wildlife biologists into wildlife historians. As Amy Skilbred testified, "I'd rather

go back to visit the wildlife that live in the area of the Mahaweli Project." She has the right as a biologist to protect that vocational interest in federal court.

### 2. *Defenders' Injury Is Traceable To The Secretary's Rule And Redressable By The Relief Sought*

Defenders fully meets the causation element of standing. The types of harm Defenders and its members have suffered fall squarely within the types of harm the Endangered Species Act aims to relieve. Congress designed the Section 7 process specifically to reduce the risk of harm to endangered species from federal actions. The Secretary has issued a final rule refusing to implement that process on any agency actions affecting species abroad. The Section 7 process has worked successfully domestically for eighteen years to improve federal projects and alleviate potential harm to endangered species. The Section 7 process will work to protect species abroad.[7]

The respondents' injury is directly traceable to the Secretary's actions. The Secretary's rule change has foreclosed the possibility of Section 7 consultations on numerous ongoing and proposed federal agency actions overseas, including the Mahaweli Dam project in Sri Lanka, the Aswan High Dam rehabilitation project in Egypt, and the Picchis-Palcazu project in Peru. The lack of consultation on these actions which "may affect" endangered species is what increases the risk of harm to those species and damages Defenders' interests.

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[7] The courts of appeals are unanimous in holding that, in order to demonstrate traceability and redressability, plaintiffs seeking to force a governmental entity to perform a statutorily required study need not prove that the study's outcome will necessarily alter the project creating the underlying harm. Such a requirement would illogically force the plaintiff to perform the very study the government has been derelict in conducting. *See, e.g., City of Davis v. Coleman*, 521 F.2d 661, 670-71 (9th Cir. 1975); *Munoz-Mendoza v. Pierce*, 711 F.2d 421, 428 (1st Cir. 1983); *Trustees for Alaska v. Hodel*, 806 F.2d 1378, 1380 (9th Cir. 1986).

The Secretary complains that Defenders should be seeking injunctions against the action agencies, not him. Such action would be pointless until the Secretary has been enjoined to comply with his duty to conduct consultations with agencies engaged in actions affecting species overseas. The Secretary now, by final regulation, refuses to consult. He is primarily responsible for enforcing the Act. *See, e.g.*, 51 Fed. Reg. at 19928 (1986); J.A. at 245. The logical step for Defenders to take is to seek to bring him into compliance with the statute he administers.[8]

In *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982), this Court held that:

> [A] plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve

[8] The Secretary's contention that the Court should not decide the legality of the 1986 rule in this action because he is the only defendant and the action agencies have not had an opportunity to provide their views, Brief of Sec'y at 25, is specious. From the first in this litigation, the Department of State and the Administrator of AID have been full participants in formulating the Secretary's legal strategy. *See, e.g.*, Defendants' Motion to Dismiss, District Court Docket Entry No. 6 at 2, J.A. at 1, identifying attorneys from the Department of Interior; Mark S. Ward and Jerome A. Patterson from U.S. AID; and David Colson and Deborah Kennedy from the Department of State to be of counsel to the attorneys from the Justice Department in this action. Attorney Ward entered a formal appearance before the district court on behalf of U.S. AID. *See* Memorandum Order dated Feb. 25, 1987, District Court Docket Entry No. 12, at 1, J.A. at 2. Having entered such an appearance, AID may well be bound by the resulting judgment of the Eighth Circuit. In requesting extensions of time from the lower courts for various activities, the reason given by the Secretary for the need for more time has consistently been to allow for consultation with the Department of State. *See, e.g.*, Appellee's Motion to Extend Until June 26, 1987, the Time in Which to File His Brief [in *Defenders I*] at 1-2 ("An extension is necessary for the Department of Justice to consult with the Department of the Interior and the Department of State [on] the brief."). In addition, U.S. AID officials have offered testimony in this action. *See, e.g.*, Affidavit of Norman Cohen, J.A. at 158.

> a discrete injury to himself. He need not show that a favorable decision will relieve his *every* injury.

(Emphasis in original; citations omitted.) The Court should not let the Secretary define what Defenders purportedly wants, and then build artificially attenuated chains of causation. *Cf.* Fletcher, *The Structure of Standing*, 98 Yale L.J. at 239-43.

The Section 7 consultation process will redress the respondents' injuries by helping to conserve species abroad. Congress, and government agencies themselves (including the Secretary of the Interior), all have specifically identified the remedial aspects of consultation.

Congress has on numerous occasions indicated its belief that the Section 7 consultation process reduces the risk of harm to endangered species. In the legislative history to the 1979 amendments to the Act, Congress stated, "This consultation process is central to the resolution of conflicts under the act." H.R. Rep. No. 167, 96th Cong., 1st Sess. 5 (1979).

Congress has never during the eighteen year existence of the Act attempted to narrow the scope of consultation or diminish its impact or importance. Congress has steadfastly pointed to "a strong record of timeliness" and "adequacy," and has found that consultation has resulted in the improvement of proposed federal agency actions. H.R. Rep. No. 567, 97th Cong., 2d Sess. 13 (1982). Throughout the process of amending the Act in 1978, Congress remained convinced that, "in many instances[,] good faith consultation between the acting agency and the Fish and Wildlife Service can resolve many endangered species conflicts." H.R. Rep. No. 1625, 95th Cong., 2d Sess. 12 (1978). The basic premise of the 1978 amendments was to insure, "that the integrity of the interagency consultation process designated under section 7 of the act be preserved." H.R. Conf. Rep. No. 1804, 95th Cong., 2d Sess. 18 (1978).

This Court should enforce Congress' choice of remedy for thoughtless agency action destructive of endangered

species—the Section 7 consultation process. In *Defenders I* the Eighth Circuit agreed that, "Congress has determined that the remedy for the harm to [Defenders'] members' personal, professional, and aesthetic interest in endangered species is consultation between the Secretary and the action agency." 851 F.2d at 1043. The Eighth Circuit's rationale was not a simplistic finding that Congress had "legislated" the requisite finding of causation. Rather, the Eighth Circuit looked in a factually complex area to the judgment of the representative branch that a system of informed consultation would most effectively protect endangered species from unthinking extermination carried out in whole or in part by federal agency action. That judicial deference to Congress was appropriate. *Cf.* Logan, *Standing to Sue: A Proposed Separation of Powers Analysis*, 1984 Wis. L. Rev. at 77-81.

Not only has Congress chosen consultation as the remedy to redress respondents' injuries; federal agencies acknowledge that consultation will, in fact, reduce risk to endangered species. The Secretary acknowledges consultation's effectiveness: "The two Services believe that these procedural regulations promote the conservation of listed species . . . ." 51 Fed. Reg. at 19928 (1986) (quoting 43 Fed. Reg. at 871 (1978)).[9] The Director of the Fish and Wildlife Service stated in connection with the Mahaweli project that because the government of Sri Lanka, "lacks the necessary finances to undertake any long-term management programs to avoid the negative

[9] The Secretary's contention in his brief at 25 that federal action agencies could simply ignore the results of a Section 7 consultation and proceed with an unmodified project which would jeopardize an endangered or threatened species is wrong. To the extent that the appellate cases cited by the Secretary imply that conclusion, *TVA v. Hill* has clearly made such decisions bad law. In *TVA v. Hill*, 437 U.S. at 185-186 n.31, this Court stated that nothing in the Act's legislative history supported such a conclusion, and that an agency which ignored the results of a Section 7 consultation would be susceptible to an action for injunctive relief brought either by the Secretary or by any person under 16 U.S.C. § 1540(g).

impacts to the wildlife," U.S. agencies, "will be the key as to how successfully the wildlife is preserved." J.A. at 216. The Director went on to conclude that, "If wildlife problems receive the same level of attention as the engineering project, then the negative impacts to the environment can be alleviated." J.A. at 216.

Indeed, the vehemence with which the Secretary has insisted throughout this litigation that applying the Section 7 process to agency actions abroad will disrupt planning and foreign relations strongly suggests that he recognizes the ability of the Section 7 process to reduce risk to endangered species. *See, e.g.*, Brief of Secretary at 31-32 and 44 n.34; Pet. of Sec'y at 20-21 and n.7; Brief of Appellant in *Defenders II* at 31, 34, 45; Reply Brief of Appellant in *Defenders II* at 11; Appellant's Petition for Rehearing *En Banc* in *Defenders II* at 15.

Defenders is confident that if this Court affirms the judgment of the lower courts, making consultation available to action agencies, those agencies will consult with the Secretary as appropriate. The Justice Department has represented that it would undertake to enforce the Court's ruling. At the deposition of Steven Schroer the following colloquy occurred:

> THE WITNESS:
>
> I firmly believe and trust that when Judge Alsop and the Court of Appeals and the Supreme Court, if it gets that far, direct the agencies to consult, as I think they will, that they will now comply with the law even if they haven't in the past. That's the remedy that I'm looking for to protect my own personal interests in these matters.
>
> MR. SHOCKEY [Justice Department]:
>
> You can rest assured the Justice Department will advise the agencies to do so if that should happen.

J.A. at 307.

In *TVA v. Hill*, 437 U.S. at 178, this Court held that the purpose of the Endangered Species Act was, "[t]he institutionalization of . . . caution," quoting H.R. Rep. No. 412, 93rd Cong., 1st Sess. 4-5 (1973). Congress created the Section 7 process to provide this institutionalized caution. *See, e.g.*, the description of the Section 7 process contained in H.R. Rep. No. 567, 97th Cong., 2d Sess. 10-11 (1982). In *Defenders I*, the Eighth Circuit held that Defenders had alleged a threat of an increased rate of extinction of endangered species absent consultation, and a procedural harm from the failure of the Secretary to conduct Section 7 consultations. 851 F.2d at 1039-1041. In *Defenders II*, on review of a factually developed record, the Eighth Circuit concluded that Defenders had proven those harms.[10] 911 F.2d at 120. Compelling the Secretary to conduct Section 7 consultations on agency actions which may affect endangered or threatened species abroad will provide the element of "institutionalized caution" that will redress Defenders' injury stemming from the threat of an increased rate of extinction of listed species, and will (obviously) redress the procedural harm which Defenders has suffered. Defenders has standing.

## II. SECTION 7 APPLIES TO AGENCY ACTIONS THAT MAY AFFECT ENDANGERED SPECIES ABROAD

The court of appeals properly held that the plain language of the Endangered Species Act demonstrated Congress' intent that Section 7 consultations be performed on agency actions which may affect listed species abroad. 911 F.2d at 123. In this situation, the court of appeals owed no deference to the Secretary's unlawful construction of the Act. *Chevron U.S.A., Inc. v. Natural Re-*

[10] The argument of the Secretary that the Eighth Circuit has read a supposed "geographical nexus" requirement out of the law on procedural injury, Brief of Sec'y at 30, is irrelevant to deciding this case in light of the proof that Defenders' members have indeed visited sites of federally funded development projects for the purpose of observing endangered animals and their habitat.

*sources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

### A. The Plain Language Of Section 4 And Section 7 Of The Endangered Species Act Mandates Application Of Section 7 To Federal Agency Actions That May Affect Species Abroad

The key to this case is the relationship of the Section 4 listing requirement to the Section 7 consultation duty. Secton 4, 16 U.S.C. § 1533(b), requires the Secretary to list foreign endangered species, and he does so. Almost half of all species listed pursuant to Section 4 are foreign to the United States. *See* 50 C.F.R. § 17.11. Section 7 requires "[e]*ach*" federal agency to consult on "*any* action" to insure that such action does not jeopardize "*any* endangered species or threatened species." By Section 4 of the Act, endangered and threatened species specifically include species whose primary range is outside the United States. The Act, on its face, leaves no room for argument. *See TVA v. Hill*, 437 U.S. at 173, and 184 n.29. As the district court held:

> The language and mandate is all inclusive; it could not be more broad. Consultation must occur whenever an action endangers *any endangered species*. Endangered species exist outside the boundaries of the United States and high seas, therefore, consultation must occur if an action in a foreign land affects an endangered or threatened species there.

707 F. Supp. at 1084-85 (emphasis by the court). Congress directed the Secretary to list species within and outside of the United States, and to consult on "any actions" affecting "any" such species.

### B. Other Sections Of The Act Support Applying Section 7 To Federal Agency Actions That May Affect Species Abroad

Numerous provisions of the Act and its legislative history make reference to the international wildlife obligations of the United States and to the international

scope of wildlife conservation. Read together and in light of the plain language of Sections 4 and 7, these provisions place in context Congress' awareness of the international nature of wildlife preservation and the congressional intent to have Section 7 apply to all federal actions.

Defenders has already described in detail the international goals Congress sought to achieve and the international wildlife commitments it sought to fulfill in passing the Endangered Species Act.

Congress' concern for preservation of endangered wildlife worldwide finds further reflection in Section 8(b) of the Act, 16 U.S.C. § 1537(b). That section provides that, "The Secretary [of the Interior], through the Secretary of State, shall encourage—(1) foreign countries to provide for the conservation of fish or wildlife and plants including endangered species and threatened species listed pursuant to [Section 4]. . . ." Eliminating the application of Section 7 to United States agency actions that may affect species abroad would seem a poor way for either Secretary to meet this duty.

The exemption provisions of Section 7(e)-(p), 16 U.S.C. § 1536(e)-(p), imply that the consultation provision of Section 7(a)(2) is applicable to agency actions that may affect species abroad. The statutory language of the exemption clauses provides that, "the Governor of the State in which an agency action will occur, *if any*, . . . may apply to the Secretary for an exemption . . . ." 16 U.S.C. § 1536(g)(1); (g)(2)(B) (emphasis added). The "Governor . . . *if any*" language clearly envisions the statute encompassing agency actions that would not affect any state's governor, such as those affecting wildlife abroad. The Secretary's argument that the *if any* phrase may simply assume coverage of activities on the high seas strains unnecessarily the statutory language. The statutory language should be given its ordinary meaning—the statute covers all those agency actions that

affect governors, and all those that do not, including actions affecting listed species in other nations.

Additional authority supporting application of Section 7 to federal agency action overseas is found in the judicial review provided for exemption decisions. Judicial review of such decisions is provided, "in the United States Court of Appeals for (1) any circuit wherein the agency action concerned will be, or is being, carried out, or (2) in any case in which the agency action will be, or is being, carried out outside of any circuit, the District of Columbia . . . ." 16 U.S.C. § 1536(n). This provision provides for adjudication of Section 7 disputes that arise outside of the territorial United States.[11]

The Secretary in his reading of the language of the Act wrongly attempts to compartmentalize the statute into severable sections, some dealing with international aspects of the problem of species extinction, others with

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[11] The Secretary argues that Congress would not have conditioned an exemption on the finding of "regional or national significance," 16 U.S.C. § 1536(h)(1)(A)(iii), if application to projects affecting species in foreign countries were intended. But the Secretary maintains that the scope of the Section 7 consultation requirement *does* include federal actions on the high seas. The exemption provision under the Secretary's interpretation, however, would be equally as inapplicable to actions affecting species on the high seas as it would be to actions affecting species in foreign nations. For this reason, the Secretary's argument is inconsistent with his own new interpretation of the scope of Section 7.

The Secretary also argues that the Secretary of State's participation on the exemption committee would have been required if Section 7 applied to actions affecting species in foreign nations. The Secretary ignores the fact that the Secretary of State is not an expert on endangered or threatened species. (State governors have access to wildlife expertise in their states' fish and game departments.) Congress provided for participation of the Secretary of State when such participation is warranted; for example, in the determination of whether an exemption would violate a treaty obligation of the United States. 16 U.S.C. § 1536(i).

domestic aspects of the problem. The Secretary must studiously ignore the fact that Congress constructed the Act to provide a global response to the disappearance of wildlife.

For instance, the Secretary argues that Section 8 of the Act, 16 U.S.C. § 1537, and only Section 8, embodies Congress' response to the problem of worldwide extinction of species. When one steps back to look at the overall structure of the statute, it is clear that Section 8 is merely part of a larger statutory triumvirate:

Section 6, 16 U.S.C. § 1535, Cooperation with States

Section 7, 16 U.S.C. § 1536, Interagency cooperation

Section 8, 16 U.S.C. § 1537, International cooperation

There is overlap and interplay among these three sections. Surely the Secretary would not argue that, because there is a separate section of the Act dealing with federal "Cooperation with States," the Section 7 consultation requirement does not apply to federal agency actions occurring in the United States. Likewise, the fact that Congress wanted a cooperative relationship on wildlife issues with foreign nations does not in any way imply that United States agencies can freely ignore their duties under Section 7 because the animals they may destroy are located overseas.

### C. The Legislative History Of Section 4 And Section 7 Of The Act Mandates Application Of Section 7 To Federal Agency Actions That May Affect Wildlife Abroad

Support for a plain reading of Section 7's requirements also comes from repeated statements in the legislative history of the Act and its amendments. In particular, the history of the 1978 amendments to Section 7, Pub. L. No. 95-632, § 3, 92 Stat. 3751 (1978), indicates that Congress intended to codify the 1978 rule, including its provisions regarding federal agency actions that may affect protected wildlife in other nations.

Section 7 received modest treatment in the committee reports on the initial Act. *See* H.R. Rep. No. 412, 93rd Cong., 1st Sess. 14-15 (1973); S. Rep. No. 307, 93rd Cong., 1st Sess. 8-9 (1973). However, Congressman Dingell, chairing the House hearings on the 1973 Act, made clear that it was aimed at protecting species worldwide:

> The point I want you to come around to understand is that this country wants a management program that is going to maintain these populations *around the world.*

Hearings on Endangered Species [H.R. 37 and Others] Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries, 93rd Cong., 1st Sess. 349 (1973) (emphasis added) (cited in J.A. at 169).

Thereafter began the consultations among the Department of the Interior and other federal agencies that resulted in the "Guidelines to Assist Federal Agencies in Complying with Section 7 of the Endangered Species Act of 1973." The Fish and Wildlife Service, the relevant lead agency on the Act within Interior, transmitted the Guidelines to all federal agencies on April 22, 1976. J.A. at 26. The Secretary received 40 comments on the Guidelines from federal agencies, and after further revisions issued a Notice of Proposed Rulemaking on January 26, 1977. 42 Fed. Reg. 4868 (1977).

The proposed rule explicitly stated that Section 7 applied to agency actions in other nations:

> [Section 7] requires every Federal agency to insure that its activities and programs in the United States, upon the high seas, and *in foreign countries* will not jeopardize the continued existence of a listed species.

42 Fed. Reg. at 4871 (emphasis added). The proposed rule received further extensive comment and led to final rulemaking on January 4, 1978. 43 Fed. Reg. 870 (1978).

None of the comments from federal agencies indicated that application of Section 7 consultation to agency actions overseas would be contrary to law. Rather, several key actors in the rulemaking process—the Council on Environmental Quality, J.A. at 161; the Interior Department's Solicitor's Office, J.A. at 181; and the General Council's Office of the National Oceanic and Atmospheric Administration—took the position that the Act's requirement that federal agency actions not jeopardize the existence of listed species was applicable to listed species abroad.[12]

The comments of the Interior Department's Solicitor's Office on the proposed 1978 rule were particularly well-reasoned and detailed in explaining why, based upon, "the language of the section, the wording of other portions of the Act, and the Act's legislative history," J.A. at 182, Section 7 required the Secretary to consult on agency actions that may affect listed species abroad. After reviewing that history, the Secretary's lawyer concluded:

> [T]he legislative history for the Act as a whole shows that the statute is aimed at protecting *foreign* species, and *every* federal agency is committed to this protection. In light of this overall purpose, any argument that the jeopardy clause is not applicable to foreign activities is simply devoid of logic.

J.A. at 183 (emphasis in original).

That portion of the final rulemaking concerning application of Section 7 tracked the provisions of the proposed rulemaking exactly:

> Section 7 . . . requires every Federal agency to insure that its activities or programs in the United States,

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[12] This dispute among federal agencies was conducted publicly as well as internally. On the question of application of Section 7 abroad, the Notice of Proposed Rulemaking gave a lengthy account of the issues and the various agencies' positions. 42 Fed. Reg. at 4869.

> upon the high seas, *and in foreign countries* will not jeopardize the continued existence of a listed species.

50 C.F.R. § 402.01 (1978), 43 Fed. Reg. at 874 (emphasis added). This provision was certainly no surprise to any agency; all had notice stretching back to the April 1976 Guidelines that the Secretary considered Section 7 to apply to agency actions which may affect species in foreign countries.[13]

This regulatory action laid a gloss of known regulation over the language of the original Section 7. When Congress made major revisions to Section 7 in 1978, it intended to restate existing law on Section 7 consultations, including the 1978 rule. The Conference Report on the 1978 Amendments, issued October 15, 1978, explained the

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[13] After the 1978 rule had become final, the Department of the Interior continued to put forth detailed arguments supporting its view that Section 7 governed agency actions affecting listed species abroad. On April 28, 1978, the Department of State wrote to the Fish and Wildlife Service, objecting to the scope of the Section 7 consultation provisions under the 1978 rule. J.A. at 187. Interior replied with a lengthy memorandum noting the presumption against extraterritorial application of statutes but finding that,

> The Endangered Species Act was premised upon the recognition that the earth's populations of fish and wildlife are international resources requiring multilateral cooperation for their preservation. Since the abandonment of the parochial "native species only" approach of the first Endangered Species Act, Pub. L. No. 89-669, 80 Stat. 926, the endangered species legislation of this country consistently has reflected an active Congressional concern for conserving fish and wildlife on a world-wide basis. . . .
>
> The jeopardy prohibition of Section 7 is equally sweeping in its intentions . . . . By its terms, the jeopardy clause applies to all Federal agencies. There is no exception for agencies involved in foreign countries. Also by its terms, the jeopardy clause applies to all species listed under the Act. There is no exception for foreign species, and most of the animals listed as endangered or threatened are in fact foreign animals.

J.A. at 167-68.

adoption of the current version of Section 7(a) in the following terms:

> The conferees adopted Senate language [in S. 2899, 95th Cong., 2d Sess. (1978)] creating a new section 7(a), which essentially restates section 7 of existing law, and outlines the responsibilities of the Secretary and other Federal agencies for protecting endangered species. . . . *The Conferees felt that the Senate provision by retaining existing law, was preferable since regulations governing section 7 are now familiar to most Federal agencies* and have received substantial judicial interpretation.

H.R. Conf. Rep. No. 1804, 95th Cong., 2d Sess. 18 (1978) (emphasis added). The district court, Chief Judge Alsop, found this statement in the Conference Report to be, "the one piece of legislative history helpful to the resolution of the present controversy." 707 F. Supp. at 1085.[14]

Under rules of statutory interpretation, the inescapable conclusion is that the 1978 rule correctly interpreted congressional intent on the application of Section 7:

> Where reenactment of a statute includes a contemporaneous and practical interpretation [e.g., an administrative rule], the practical interpretation is accorded greater weight than it ordinarily receives, as it is regarded as presumptively the correct interpretation of the law. . . .
>
> This rule is based upon the theory that the legislature is familiar with the contemporaneous interpretation of a statute, especially when made by an administrative body or executive officers charged with the duty of administering or enforcing that statute.

2A N. Singer, *Sutherland Statutory Construction* § 49.09 at 400 (Sands 4th ed. 1984). *See also Hartley v. Com-*

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[14] Next to the statute, the Conference Report is the most authoritative source of congressional intent. *See, e.g., Demby v. Schweiker*, 671 F.2d 507, 510 (D.C. Cir. 1981).

*missioner*, 295 U.S. 216 (1935) (upon reenactment of a statute, an administrative interpretation of a provision therein has the force of law).

In this context, it is crucial to remember that when Congress passed the 1978 amendments, the State Department and other agencies had already made known to Interior their objections to the application of Section 7 to agency actions which may affect species abroad. *Compare* J.A. at 187 and 164. By approving the 1978 rule in the Conference Report, Congress took sides in a known dispute between Interior and State, and came down firmly in favor of Interior's position, embodied in the 1978 rule.

Upon careful review of the administrative process leading to the 1978 rule, the court of appeals concluded:

> In light of the extensive commentary made by numerous agencies on the issue . . . we believe that it is highly unlikely that Congress was unaware of this statute and the law.

911 F.2d at 124. Simply reading the 1978 regulation would immediately confirm that it applied to federal actions overseas.

### D. The Critical Habitat Designation Clause Of Section 4 Does Not Demonstrate A Domestic Intent For Section 7 Consultations

Whether or not critical habitat should theoretically be designated in foreign countries has no bearing on this case, and is not part of it. The issues of critical habitat designation and consultation are statutorily distinct. The Secretary's discussion of critical habitat ignores Section 4, the section of the Act under which critical habitat is actually designated (not Section 7, as the Secretary would have the Court believe). Under Section 4(b)(1)(A), 16 U.S.C. § 1533(b)(1)(A), the Secretary is to list species as endangered or threatened, "solely on the basis of the best scientific and commercial data available to him . . . ." The statute creates a different, looser, standard in Sec-

tion 4(b)(2), 16 U.S.C. § 1533(b)(2), for critical habitat designation, wherein "economic impact[s], and any other relevant impact[s]," of designating an area as critical habitat may be considered.

Because critical habitat designation and species listing occur under different statutory standards in Section 4, the issue of whether or not the Secretary should designate critical habitat abroad is analytically distinct from the issue in this case, the scope of the Section 7 consultation requirement. In the past, the Secretary has recognized this distinction. *See* J.A. at 181.

**E. Applying Section 7 To Agency Actions That May Affect Listed Species Overseas Does Not Infringe Foreign Sovereignty**

The Secretary argues repeatedly that Congress couldn't really have meant what it said in the statute; that requiring Section 7 consultations on agency actions that may affect listed species abroad would be too great an imposition on foreign nations' sovereignty to countenance. One of the most intelligent responses to this argument was written over a dozen years ago by the Secretary's own lawyer, the Interior Solicitor, in connection with the 1978 rule. This whole controversy was aired and decided by the relevant agencies prior to Congress' amendment of the Act in 1978.

In his comments on the proposed 1978 rule, the Interior Solicitor considered the argument,

> that using the jeopardy clause [Section 7(a)(2)] to curb the overseas activities of federal agencies would infringe on the sovereignty of foreign countries by imposing on them the environmental policies of the United States . . . .

The Solicitor responded:

> With regard to infringing on foreign sovereignty, section 7's jeopardy clause is no greater imposition of U.S. environmental policy than section 9's prohibitions [16 U.S.C. § 1538], or than section 11's provi-

> sion for forfeiting foreign species and products if they are seized by U.S. agents. *It should be remembered that the jeopardy clause actually applies only to U.S. agencies* . . . .

J.A. at 185 (emphasis added).[15]

When looking at the plain language of Sections 4 and 7(a) of the Act, it is important to remember that the question of applying Section 7 consultation requirements to federal agency actions that may affect listed species in another country is not a typical extraterritoriality problem. Application of Section 7 to such agency actions will have no impact on the sovereign powers of foreign governments or their exercise of those powers. The direct impact of applying Section 7 to agency actions affecting species overseas will be on the planning processes of United States agencies, which occur primarily in this country.

Indeed, U.S. overseas development agencies regularly conduct environmental studies in connection with their overseas activities that are more burdensome than the Section 7 consultation at issue here. AID, for example, has codified extensive Environmental Procedures. *See* 22 C.F.R. Part 216. For certain listed types of projects, see 22 C.F.R. § 216.2(d), or when AID determines through preliminary review that an action it proposes to take will have a significant effect on the environment, AID prepares an Environmental Impact Statement. AID's rules

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[15] To the extent that genuine national security concerns are at stake in a given situation, the Endangered Species Act contains an explicit national security exemption from the Section 7 process. *See* 16 U.S.C. § 1536(j). If special speed or flexibility are needed in the consultation process to meet identified foreign affairs concerns, AID or other appropriate action agencies can apply to the Fish and Wildlife Service to draft counterpart Section 7 regulations addressing such specific concerns. *See* 50 C.F.R. § 402.04; *see also* 43 Fed. Reg. at 871 (1978). In this manner the concerns expressed in foreign affairs cases such as *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957), and *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963), can be avoided.

provide that the EIS is, "a specific document having a definite format and content, as provided in NEPA and the CEQ Regulations." 22 C.F.R. § 216.1(c)(5). In essence AID complies with the National Environmental Policy Act in its actions abroad without interfering with foreign sovereignty or foreign policy. It can just as easily comply with the Endangered Species Act.

Applying Section 7 consultations to federal agency actions that may affect listed species in other nations will not restrict the ability of foreign sovereigns to plan their own development strategies or wildlife conservation programs, and will in fact provide them with valuable scientific information.[16] The Section 7 consultation may result in the withdrawal of United States participation in some specific development project, but attaching conditions to U.S. foreign aid is within the province of Congress, and has never before been considered a legal invasion of another nation's sovereignty.[17]

The Eighth Circuit's conclusion on this issue of purported intrusion on other nations' sovereignty was well-reasoned and correct:

> We note initially that the Act is directed at the actions of federal agencies, and not at the actions of

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[16] The only comment from a foreign country noted in the extensive administrative record in this action is found in an internal FWS memo noting that Sri Lanka had requested assistance in preserving its endangered species from the Mahaweli project. J.A. at 78.

[17] For example, 22 U.S.C. § 2151q(g)(10), concerning endangered species, mandates that the AID administrator in foreign countries shall, "deny any direct or indirect assistance under this chapter for actions which significantly degrade national parks or similar protected areas or introduce exotic plants or animals into such areas." 22 U.S.C. §§ 2281-2286 outline "debt-for-nature" exchanges in which the administrator of AID is authorized to cancel foreign debt when a government makes funds available for eligible projects, defined by the AID administrator, "involving the conservation or protection of the environment in that country," or makes a, "policy commitment to take certain specified actions to ensure the restoration, protection, or sustainable use of natural resources within that country." 22 U.S.C. § 2281(1) and (2).

> sovereign nations. Congress may decide that its concern for foreign relations outweighs its concern for foreign wildlife; we, however, will not make such a decision on its behalf.

911 F.2d at 125.

### F. The Presumption Against Extraterritorial Application Of Statutes Does Not Govern This Action

Extraterritoriality is the exercise of jurisdiction by a state over persons outside its territory. *Cf.* Restatement (Third) of the Foreign Relations Law of the United States § 402 (1987). The Section 7 consultation requirement only regulates United States agency actions, often carried out within the boundaries of the District of Columbia. The Section 7 consultation requirement does not attempt to regulate or control U.S. nationals or corporations residing or engaging in activities in foreign countries. Nor does consultation attempt to regulate or control the actions of foreign governments, foreign corporations or citizens of foreign countries.

The Section 7 consultation requirement is an effort by Congress to control the internal operating procedures of its government. This Court's cases involving the judicial doctrines of extraterritoriality have always involved attempted regulation of U.S. nationals or corporations in foreign countries, where foreign laws may be controlling.[18] That situation is not present here.

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[18] *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909), the earliest case characterized by the Court as involving extraterritoriality, involved two U.S. corporations doing business in Latin America. *Blackmer v. United States*, 284 U.S. 421 (1931), was concerned with finding an American citizen residing in Paris in contempt of the Supreme Court of the District of Columbia for failing to respond to criminal witness subpoenas served upon him in France. In *Foley Bros., Inc. v. Filardo*, 336 U.S. 281 (1949), an American citizen was employed by the defendant on certain public works in which the wages in dispute arose out of work done in Iran and Iraq. *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952), involved the applicability of the Lanham Act to a citizen of the United States who

Even if Section 7 consultation were to be considered extraterritorial application of a statute, the presumption of statutory construction against extraterritorial application of statutes would not govern this case. *See, e.g., Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949). In *EEOC v. Arabian American Oil Co.*, 111 S. Ct. 1227, 113 L. Ed. 2d 274 (1991), this Court recently stated that, "In applying this rule of construction, we look to see whether 'language in the [relevant act] gives any indication of a congressional purpose to extend its coverage beyond places over which the United States has sovereignty or has some measure of legislative control,'" 113 L. Ed. 2d at 282 (quoting *Foley Bros.*). The Eighth Circuit properly applied this standard—it examined the Endangered Species Act and found abundant evidence that Congress intended to protect endangered species worldwide.

Furthermore, if the nature of a statute mandates extraterritorial application, there is no presumption against such an interpretation. *United States v. Mitchell*, 553 F.2d 996, 1002 (5th Cir. 1977), and cited authorities. As the Secretary admits in his answer, J.A. at 248-49, the 1986 rule denies to listed species overseas the protection under Section 7 that listed species in the United States receive. Such a construction clearly frustrates the Endangered Species Act's purpose. *See* 16 U.S.C. § 1531(b).

The *EEOC v. Arabian American Oil Co.* decision is easily distinguished from this case on the basis of congressional intent in passing the underlying statute. In enacting Title VII, and the 1964 Civil Rights Act as a whole, Congress was clearly responding to a problem conceived of almost entirely in domestic terms: formal racial segregation in the South, and pervasive private racial discrimination in American business. In contrast, as dis-

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deceptively used the trademark "Bulova" to sell watches in Mexico. Most recently, *EEOC v. Arabian American Oil Co.*, 111 S. Ct. 1227, 113 L.Ed.2d 274 (1991), concerned the applicability of Title VII to employment practices of United States employers who employ United States citizens abroad.

cussed at length throughout this brief, Congress in passing the Endangered Species Act was responding to a problem explicitly international in scope: the disappearance of wildlife through man's too often thoughtless, unstudied development and exploitation.

In the Endangered Species Act, when Congress wanted to distinguish among the United States, the high seas, and foreign nations, as it did in Section 9's taking provisions, 16 U.S.C. § 1538(a)(1)(B) and (C), it did so. As Chief Judge Alsop noted:

> Section [7]'s all-inclusive language, when contrasted with the discriminatory language of section [9], cannot be considered sloppiness on the part of Congress, but, rather, intentional language expressing a concern that the consultation provisions be given effect wherever agency action took place.

707 F. Supp. at 1085. Statutory presumptions cannot overcome the clear requirements of the Endangered Species Act that all endangered and threatened species receive the same degree of protection under Section 7 from thoughtless federal agency actions that may exterminate them from the earth.

## CONCLUSION

For all of the reasons stated above, this Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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August 1991

# APPENDIX

## APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

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Civil No. 3-86-757

DEFENDERS OF WILDLIFE, FRIENDS OF ANIMALS AND THEIR ENVIRONMENT, and THE HUMANE SOCIETY OF THE UNITED STATES,
*Plaintiffs,*

vs.

DONALD P. HODEL, as Secretary of the Interior
*Defendant.*

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### AFFIDAVIT OF DR. JOHN W. GRANDY

DISTRICT OF COLUMBIA ) ss.

Dr. John W. Grandy, being duly sworn, states:

1. I am a member of The Humane Society of the United States (HSUS) and have been a member since 1981. As an officer of The HSUS and the organizational representative for this litigation, I summarize herein the organizational interest and involvement of The HSUS in this issue, as well as my own interest as a member.

2. I am the Vice President for Wildlife and Environment of The Humane Society of the United States ("Humane Society"), a nonprofit organization which is one of the organizational plaintiffs in the above-captioned suit. I have an extensive educational and professional background in wildlife research, management, and ecology.

I have a long-standing professional and personal interest in endangered and threatened species and their protection worldwide. I hold a Bachelor's Degree in forestry and wildlife management, a Master's Degree in wildlife biology, and a Ph.D. in wildlife ecology.

3. I have testified in the United States District Court for the District of Columbia as an expert witness qualified by the Court in the fields of wildlife management, ecology, and biology.

4. From 1971 to 1974, I was wildlife specialist and program coordinator for the National Parks and Conservation Association. During that time, I participated actively in the drafting and finalizing of a multilateral wildlife treaty, the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES").

5. During portions of 1974 and 1975, I served as a staff assistant to the Senior Scientist at the President's Council on Environmental Quality.

6. In addition, from 1975-1981, I was Executive Vice President of Defenders of Wildlife, Inc., a nonprofit organization concerned with the protection of wildlife.

7. I was appointed to and served as a member of two major advisory committees to the U.S. Department of the Interior: (a) the National Wildlife Refuge Study Task Force and (b) the Animal Damage Control Policy Study Advisory Committee to the Secretary of the Interior.

8. I make this affidavit of my own knowledge and, if called upon to testify, could testify to the matters herein.

9. The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) is a treaty adhered to by 91 nations, and is the international community's principal means of protecting species from the negative effects of international trade. I participated actively in negotiating this treaty in 1971, 1972,

and 1973. I was a member of the U.S. Delegation to the special working session of CITES in 1977, and have participated as an official Observer in CITES meetings since, and including, 1979. In these meetings since 1981, I have actively represented the goals of The Humane Society of the United States for the protection, preservation, and wise management of animals.

10. I visited the nation of Costa Rica in 1979; I visited New Delhi, India and the nation of Nepal in 1981; I visited Gaborone, Botswana in 1983; and I visited Buenos Aires, Argentina in 1985. I visited these places principally in connection with being an official Observer to meetings of the Conference of the Parties of the Convention on International Trade in Endangered Species of Wild Fauna and Flora. An additional purpose of the trips, however, was to expand my knowledge of endangered and threatened wildlife and its habitat in areas noted above. In each of these countries, I visited cities, parks, rivers, and natural areas whenever possible, and as an ornithologist and bird watcher, watched birds with the hope of adding endangered and threatened species to the list of birds I have observed in the wild.

11. I will suffer personal and professional harm, in fact, as a result of U.S.-funded development and U.S. agency actions in the above mentioned countries and surrounding areas. For example, the deforestation which will result from the Polonoroestre project funded, in part, by the United States through the World Bank, in the Amazon Basin, will directly reduce the numbers and habitat and/or migration points of endangered birds such as the Harpy eagle and the Red Siskin. In the future, I plan to revisit the above mentioned countries and study and enjoy endangered and threatened species there.

12. For more than ten years, The Humane Society of the United States has been actively involved in matters pertaining to international protection and management of wildlife through activities involving North Pacific fur

seals (Interim Convention on Conservation of North Pacific Fur seals) and whales (International Whaling Commission). The HSUS was represented at the last three meetings of the North Pacific Fur Seal Commission as a member of the U.S. Delegation, and was represented as an official observer at the last ten meetings of the International Whaling Commission.

13. The HSUS sponsors a tour of Africa for the benefit of its members and supporters. This tour, which is of high value to many members, is currently conducted only to Kenya, but has in the recent past visited both Kenya and Tanzania. The purpose of the trip is to observe and enjoy wildlife, particularly and specifically the threatened leopard, the threatened African elephant, the endangered white rhinoceros, the endangered cheetah, and their habitat. The HSUS annually evaluates the possibility of conducting tours to many areas of the world, including South America and Africa.

14. During the last year, The HSUS commissioned and funded a study by Mr. Douglas Shane entitled "Assault on Eden: Destruction of Latin America's Rain Forests" (copy attached—not for publication) to elucidate the problems occurring as a result of development in tropical rainforests. Many of the problems which Mr. Shane identified can be tied to U.S. funding of international development projects. This study will be published as part of an HSUS monograph on the subject in 1987.

15. The Humane Society of the United States is also deeply interested in the conservation and humane treatment of wild birds in foreign countries, as evidenced by our having funded an investigator in the Amazon (see affidavit of Campbell Plowden) and by an action of the program and planning committee of our board of directors on September 16, 1986, and consensus action in our executive committee on behalf of our board of directors on September 17, 1986, *to wit*: "It was the consensus The HSUS should continue to pursue and support activi-

ties to end tropical rain forest destruction." Executive Committee Meeting Minutes, September 17, 1986.

16. United States-sponsored development through direct foreign assistance, contributions by the U.S. Agency for International Development, and through U.S. contributions to international monetary institutions have substantial and significant negative impacts on wild mammals, wild birds, wild reptiles, and other animals, including endangered and threatened species.

17. The Humane Society of the United States and its members will be harmed, in fact, by the named projects, among others, by the lack of official consultation, in general, and in regard to those projects, and by the reduction and jeopardizing of endangered and threatened species, including, but not limited to those named, by those above mentioned projects and other U.S.-funded and U.S. agency actions.

/s/ John W. Grandy
JOHN W. GRANDY

Subscribed and sworn to before me this 6th day of November, 1986.

/s/ Joan P. Spade
Notary Public